Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Geographic Partitioning and Spectrum	)	WT Docket No. 96-148
Disaggregation by Commercial Mobile	)	
Radio Services Licensees	)	

U S WEST REPLY COMMENTS

U S WEST, Inc. submits these reply comments in response to the Notice of Proposed Rulemaking, FCC 96-287 (July 15, 1996)("Notice"), which proposes to expand the opportunities of broadband PCS licensees to take advantage of geographic partitioning and spectrum disaggregation so that PCS spectrum may be used fully and more efficiently.

I. Summary of Reply Comments

U S WEST makes three points in these reply comments. In Part I below, U S WEST demonstrates that the vast majority of commenters support the Commission's proposals; if anything, these comments demonstrate persuasively that the proposals do not go far enough in relying on market forces instead of government regulations.

In Part II U S WEST addresses the opposition of some rural telephone companies and some of their trade associations, which want to maintain the status quo at least with respect to partitioning. U S WEST demonstrates that these commenters appears to want

the Commission to insulate them from competition and to deprive rural residents of the benefits of having competitive choices.

Finally, in Part III U S WEST addresses an important subject overlooked in the Notice and in all comments, including U S WEST's. Specifically, changes to the partitioning and disaggregation rules require concomitant changes to the divestiture rules contained in Rule 20.6(e).

II. The Record Evidence Demonstrates That, If Anything, the Commission's Proposals Do Not Go Far Enough

The Commission's proposals to permit open eligibility partitioning and immediate disaggregation received strong support from a broad "spectrum" of commenters, including large LECs,[1] rural telcos,[2] incumbent CMRS providers,[3] PCS auction winners,[4] small businesses still participating in the PCS auctions,[5] and others.[6] These commenters noted the same four benefits U S WEST listed in its comments:

1. Existing licensees benefit because they could use the revenues generated from partitioning and disaggregation to help build their systems;[7]

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[1] *See, e.g.,* BellSouth and GTE.

[2] *See, e.g.,* Liberty Cellular and National Rural Telecommunications Cooperative ("NRTC").

[3] *See, e.g.,* AT&T Wireless. *See also* Cellular Telecommunications Industry Association ("CTIA") and Personal Communications Industry Association ("PCIA").

[4] *See, e.g.,* Cook Inlet Region; NextWave Telecom; Omnipoint; Sprint Spectrum; and Western Wireless.

[5] *See, e.g.,* AirGate Wireless and PCS Wisconsin.

[6] *See, e.g.,* American Petroleum Institute ("API"); Industrial Telecommunications Association ("ITA"); SR Telecom; and UTC, the Telecommunications Association.

[7] *See, e.g.,* NRTC at 4.

2. Firms acquiring partitioned or disaggregated spectrum would realize new business opportunities not otherwise available;[8]

3. This Commission would be able to take concrete and meaningful steps to discharge its statutory directives to remove unnecessary barriers to entry, to promote the dissemination of licenses among a wide variety of firms, and to ensure that spectrum is used efficiently and fully.[9]

4. The proposals would benefit the American public which would realize sooner more competitive choices and innovative services than would be the case under the current restrictive rules — especially in underserved rural areas.[10]

Indeed, most commenters agree that the Commission's proposals do not go far enough in allowing marketplace forces to operate freely. For example, virtually every commenter addressing the issue concurs that the proposal to permit geographic partitioning solely on county lines is far too restrictive. Commenters explain convincingly that

[8] *See, e.g.,* AirGate Wireless at 2 ("The proposals . . . if adopted, will create a whole wealth of new opportunity for small businesses, like AirGate Wireless."); Liberty Cellular at 3; NRTC at 4; Omnipoint at 1-2; PCS Wisconsin at 1-2 ("The increased ability to partition PCS licenses will have the effect of allowing many additional entities to become involved in the provision of PCS services thereby geometrically increasing competition within the industry and allowing these new providers to concentrate on areas that otherwise might go unserved or fall lower on the priority scales for build-out."); and Sprint Spectrum at 2.

[9] *See, e.g.,* AT&T Wireless at 2; GTE at 3; PCS Wisconsin at 5 ("The Commission's tentative conclusion that its current prohibitions on disaggregation constitute a barrier to entry for small business is correct. Removal of this barrier should immediately spur numerous small businesses to seek entry to the industry through the disaggregation method."); and SR Telecom at 5 (Without disaggregation, "scarce spectrum resources would be underutilized").

[10] *See, e.g.,* NRTC at 3 and 6; Omnipoint at 1; and Sprint Spectrum at 2.

parties should be free to use any geopolitical boundary, as is already permitted under the current restrictive partitioning rule.[11] Others demonstrate persuasively that businesses should be free to use boundaries other than geopolitical boundaries, including telephone company exchange boundaries,[12] or any other boundary (*e.g.*, river) meaningful to the two parties involved.[13]

While is also broad support for the Commission's proposal to introduce flexibility in the build-out requirements applicable to partitioned and disaggregated licenses,[14] some commenters also agree with U S WEST that the public interest would be served by giving licensees even greater flexibility.[15] As U S WEST explained in its comments, minimal new build-out requirements should be imposed on partitioned and disaggregated licensees — so long as the original licensee is willing to meet all of its original build-out requirements.

In summary, the record establishes conclusively not only that the current restrictive regulations are unnecessary, but also that market-based solutions can more effectively promote the public interest.

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[11] *See, e.g.*, AirGate Wireless at 3; PCIA at 3-4; and PCS Wisconsin at 2. Even the current rule requires only that the rural telco partition must "conform to established geopolitical boundaries (such as county lines)." *See* 47 C.F.R. § 24.714(d)(1).

[12] *See, e.g.*, Carolina Independents at 3-5 (notes situations where up to eight telcos serve a single county); and Yelm Telephone.

[13] *See, e.g.*, BellSouth at 5-7; CTIA at 6-7; Omnipoint at 9-10; Sprint Spectrum at 4; and SR Telecom at 8-9.

[14] *See, e.g.*, Carolina Independents at 2-3; and PCS Wisconsin at 4.

[15] *See, e.g.*, AT&T Wireless at 5-6; BellSouth at 10-12; CTIA at 10-11; PCIA at 5-7; Omnipoint at 6; and Sprint Spectrum at 11-12.

III. The Commission Should Not Entertain Seriously the Attempts By a Few to Prevent Residents of Rural America From Enjoying the Benefits of Competitive Choices

Current rules permit PCS licensees to partition their spectrum, but only to rural telephone companies ("rural telcos").[16] This rule has the practical effect of allowing only one PCS licensees to partition their spectrum because there are six PCS licenses assigned to every area while there is at most only one rural telco serving any one area.[17] The Commission has now proposed to open eligibility for partitioning, largely because under the current "rural telco-only" partitioning rules, large chunks of PCS spectrum in rural areas will likely not be used at all or not be used fully.[18] Residents of rural areas, the Commission has observed, should have the same opportunity to enjoy the benefits of competitive choices enjoyed by their urban counterparts.[19]

A handful of rural telcos and some of their trade associations oppose this open eligibility partitioning proposal.[20] These opponents fall into two camps. Some assert that

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[16] *See* 47 C.F.R. § 24.714.

[17] In theory, firms interested in serving rural areas may acquire up to 45 MHz of spectrum which would permit several licensees to partition their spectrum. However, U S WEST doubts whether anyone needs more than 10 MHz to serve most rural areas.

[18] *See* Notice at 11-12 ¶ 16.

[19] Id. at 12 ¶ 17.

[20] These rural telcos and their associations do not appear to challenge the Commission's disaggregation proposal. Moreover, not all rural telcos and trade associations agree with their colleagues with respect to the Commission's partitioning proposals. For example, Liberty Cellular, which is owned by 25 rural telcos, notes that open partitioning "will facilitate participation by a variety of diverse groups, not just rural telephone companies" and will "promote competition among carriers and availability of diverse services to the public." Liberty at 2 and 3. Similarly, the National Rural Telecommunications Cooperative, with 231 rural telco members, "supports the Commission's proposals" because open partitioning "should facilitate the delivery of a variety of modern telecommunication services in rural America." NRTC at 1 and 4.

the Commission should not change its rules at all, so they (and the residents of rural areas they serve) are insulated from all CMRS competition — the "me-only" approach.[21] Other rural telcos alternatively contend that the Commission should at least impose a "right-of-first-refusal" requirement on all partitioning proposals, so they can sit back and pick and choose when they might enter the CMRS market — the "always-me-first" approach.[22]

These rural telcos generally begin their analysis by asserting that they alone have the "exclusive right" to obtain a partitioned license.[23] In support, they rely on one small portion of Section 309(j)(3) of the Communications Act, which directs the Commission to promote the dissemination of licenses "among a wide variety of applicants, including . . . rural telephone companies . . . ."[24]

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[21] *See* Ad Hoc Rural Telecommunications Group ("RTG"); Century Personal Access Network ("Century"); Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"); and 3 Rivers PCS/Montana Wireless. 3 Rivers/Montana Wireless make this "me-only" argument even though they already have partitioning agreements in place and on file with the Commission. *See* Comments at 1 n.1 and 2 n.2. The 3 Rivers/Montana Wireless position represents nothing less than a request for government protection from competition.

[22] *See* Illuminet and the Independent Alliance (collectively, "Alliance"); National Telephone Cooperative Association ("NTCA"); and United States Telephone Association ("USTA"). The Rural Cellular Association ("RCA") also advocates a "right-of-first-refusal" requirement but, because its members include rural cellular carriers unaffiliated with rural telcos, RCA asserts that the right-of-first-refusal should be extended to incumbent rural CMRS providers, as well. *See* RCA Comments at 4.

[23] *See, e.g.,* NTCA at 2; OPASTCO at 4, 6, 7, 8, and 9; and RTG at 7 and 8.

[24] 47 U.S.C. § 309(j)(3)(B). Read literally, Section 309(j)(3) applies only to Commission allocation decisions and its competitive bidding rules, not to post-auction activities like partitioning. Also significant is that Section 309(j)(3)(B) directs the Commission to "promote" the dissemination of licenses "among a wide variety of applicants," not guarantee that licenses are given to rural telcos.

Completely overlooked by these rural telcos are the other objectives Congress has also directed the Commission to consider, including:

> "(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> "(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses . . . .
>
> * * *
>
> "(D) efficient and intensive use of the electromagnetic spectrum."[25]

The rural telco "me-only" and "always-me-first" arguments are flatly inconsistent with all three of these objectives. Consequently, there is no right, much less an "exclusive right," which affords only rural telcos the opportunity to obtain partitioned licenses.

The basic argument of these opposing rural telcos is that if other firms are also eligible to acquire partitioned licenses, they will be unable to acquire even one of up to six potentially available partitioned PCS licenses.[26] This completely undocumented "can't-compete" argument is absurd.[27] Even if rural areas were capable of supporting six

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[25] 47 U.S.C. § 309(j)(3)(A), (B), and (D)(emphasis added).

[26] *See, e.g.,* NTCA at 4 (The proposed changes "will certainly result in further deterioration of any bargaining power rural telephone companies might have had."); and at 5 (The proposed change "will eliminate rural telephone companies as viable contenders in their areas" for partitioned spectrum); OPASTCO at 4 ("Broadening the partitioning provision would once again deny many rural telephone companies a 'viable opportunity . . . to successfully acquire PCS licenses and offer service to rural areas.'"); RTG at 8-9 ("If the partitioning proposal under consideration is adopted, then the Commission will have . . . bankrupted their opportunity, and right, to provide PCS service."); and Century at 8 ("The NPRM proposes to dilute substantially, and perhaps abrogate entirely, these rights" to obtain a partitioned license."). Century's "can't compete" assertion is especially baseless given that its 1995 revenues exceeded $600 million!

[27] The other arguments advanced by the rural telcos require no response, including:

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operational PCS systems (when an urban area as large as London is capable of supporting only three), the rural telcos have presented no facts to suggest that they would not be successful in obtaining the spectrum band of their choice. Indeed, elsewhere in their comments, the opposing rural telcos readily boast of their competitive advantage over all other potential PCS market entrants, as evidenced by the statement by the Rural Telecommunications Group:

> It is a well-recognized fact that rural telephone companies clearly have an advantage in speeding new services to their customers by virtue of their existing wireline infrastructure (*e.g.,* poles, towers, switches, personnel). Any other entity has the burden of creating the necessary infrastructure to reach low-density population areas and persons situated in remote and/or rugged terrain. The creation of such an infrastructure involves the investment of considerable time and money, and a high likelihood of delay before all persons seeking delivery of the service can receive it.[28]

Even if there were a risk that a rural telco could not obtain a partitioned license if forced to complete with other interested firms, this small risk would not justify continuation of the current "me-only" policy. Congress, though giving rural telcos substantial

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- Allowing anyone to acquire a partitioned license "will reduce" the incentive of the original licensees "to negotiate arrangements for partitioned rural areas" (NTCA at 4);
- Persons other than rural telcos are "less-qualified" to serve rural areas and are "cream-skimmers" (RTG at 3 and 4);
- After paying money to acquire a partitioned license, firms other than rural telcos will "delay building out a PCS system in that area, or even foregoing bringing service to the area altogether" (id. at 4); and
- Rural telco cannot compete in acquiring a license because "[d]esignated entities . . . tend to have more capital" (id. at 8).

[28] RTG at 3. *See also* OPASTCO at 7 ("By augmenting new wireless technology with its own wireline facilities, a rural telco, unlike any other entity, can more easily offer PCS service to even the most distant and isolated farms and residences."); 3 Rivers/Montana Wireless at 2. The Commission, too, has repeatedly noted that rural telcos have an "edge" over other PCS entrants. *See, e.g.,* Notice at 12 ¶ 17; Seventh Competitive Bidding Report and Order (900 MHz SMR), 11 FCC Rcd 2639, 2700 at ¶ 154 (1995); Fifth PCS Report and Order, 9 FCC Rcd 5532, 5597 ¶ 149 (1994).

protection against competition from other landline LECs,[29] has given them no such protection in connection with CMRS services. To the contrary, as noted above, it has charged this Commission with developing spectrum policy which promotes both competition and the rapid deployment of CMRS services in rural areas. If the Commission were to maintain its current "me-only" partitioning rule, coupled with the protections recently afforded rural telcos with respect to landline competition, residents of rural areas may never begin to enjoy any of the competitive choices available to their urban counterparts.

Equally pernicious and unnecessary is their alternate "right-of-first-refusal" proposal. A right-of-first-refusal is a right almost anyone would covet; a firm could sit back while others do all the work (*e.g.,* prepare a business plan, contact current licensees, conduct partitioning negotiations), and then step in at the 11th hour if it thinks the business prospects appear promising. But the rural telco proponents of this "right" never explain cogently why they should possess such a right — especially given the fact that, for the past two years, they alone have been eligible to obtain partitioned spectrum.[30] They say this "right" would "foster service provision by [rural telcos] that are committed to these rural areas."[31] But if a rural telco is committed to providing PCS in its service area, it is

[29] *See* 47 U.S.C. § 251(f)(1). Under this new provision, rural telcos are exempt from the obligations imposed upon other incumbent LECs in Section 251(c) until the telco receives a bona fide request for interconnection and the state commission determines that such a request "is not unduly economically burdensome, is technically feasible, and is consistent with Section 254."

[30] U S WEST is somewhat surprised by the relatively few partitioning applications now pending at the Commission. Although some rural telcos assert that some unidentified PCS licensees are too busy to talk to them (*see* Alliance at 4 n.8; Century at 8), one major PCS licensee has said that, based on its experience, "most rural telephone companies have little interest in obtaining a partitioned portion of its licensed area." Western Wireless at 4.

[31] Alliance at 8.

not immediately clear why this telco, already having a head start, would wait to investigate partitioning possibilities until after someone else had negotiated the first partitioning deal.

Besides, right-of-first-refusal provisions can themselves act as a market barrier. Firms, and small businesses in particular, may be reluctant to invest the resources necessary to negotiate and successfully complete a partitioning agreement (which first requires a business case), if the firm can lose the deal at the last moment because a rural telco, sitting on the sidelines, suddenly decides to exercise its "right of first refusal."

In addition, right-of-first-refusal provisions engender delay, as the holder of the right decides whether and when to exercise the right. Such provisions often result in litigation to determine whether the holder of the "right" actually matched the original offer. Congress, it bears repeating, has emphasized the need for the Commission to implement spectrum policy "without administrative or judicial delays."

The rural telco proponents of the "me-only" and "always-me-first" proposals assert that "the Commission's proposed partitioning plan sacrifices the interests of the rural telecommunications consumer for the Commission's short-sighted attempt to bring more providers into the market."[32] However, both Congress and this Commission have made unmistakably clear that the interests of consumers, including those residing in rural areas, are best served by increasing the number of competitive alternatives available to them.

[32] RTG at 5.

IV. The Commission Should Also Amend Its Divestiture Rule 20.6(e)

As noted above, there is broad and strong support among commenters that CMRS licensees should be afforded more flexibility in partitioning and disaggregating their spectrum. These parties have demonstrated the significant public interest benefits which will flow from allowing the market to operate freely. Consistent with this analysis, it is clearly appropriate for the Commission also to liberalize the divestiture provisions associated with the recently adopted consolidated spectrum cap rules to accommodate the partitioning and disaggregation policies proposed in this proceeding.

Specifically, U S WEST recommends that the Commission modify Rule 20.6(e) to allow post-acquisition divestiture by any party holding interests that, upon grant of a license or consummation of an acquisition, would exceed the spectrum aggregation limits — so long as the divestiture procedures set forth in Rule 20.6(e)(2) through (4) are followed. In particular, if CMRS licensees are given the flexibility to partition and disaggregate their spectrum to serve their marketplace requirements, the Commission should liberalize, if not eliminate altogether, the current restrictions on divestiture contained in Rule 20.6(e)(1)(i) through (iii).

The spectrum cap rules currently prohibit a licensee from holding more than 45 MHz of combined broadband cellular, PCS, and SMR spectrum in the same geographic area. Section 20.6(e), however, enables firms to exceed this cap only so long as they divest any "excessive" spectrum within 90 days following acquisition.

These divestiture procedures are not available to all parties, however. As specified in Rule 20.6(e)(i) through (iii), the divestiture alternative can be exercised only by parties (i) holding CMRS interests which cover 20% or less of the area's population; (ii) with attributable interests tied solely to management or joint marketing agreements; and (iii) with non-controlling attributable interests in the CMRS spectrum.[33]

These divestiture limitations were put in place primarily to prevent abuses of the PCS auction procedures, one concern being that firms with significant cellular holdings might participate in an auction with the sole intent of bidding up the licenses. Whatever the validity of this concern when first articulated, it is no longer relevant now that the 30 MHz PCS block licenses have been awarded. Should the Commission liberalize the partitioning and disaggregation rules as proposed, all firms should be able to avail themselves of the divestiture provisions to come into compliance with the spectrum cap rules.

In post-auction acquisitions and mergers, for example, a cellular operator may find itself acquiring an "offending" 30 MHz PCS system as part of a larger transaction, with the entirely appropriate desire to integrate some part of the PCS spectrum into its ongoing systems to create a more efficient, broader-coverage wireless network offering.[34] With the right to utilize post-acquisition disaggregation of a portion of the PCS license as

[33] For purposes of this rule, a non-controlling interest is one in which the holder has less than a 50% voting interest and there is an unaffiliated single holder of a 50% or greater voting interest. *See* 47 C.F.R. § 20.6(e)(iii).

[34] As the Commission knows, the geographic scope of the various CMRS licenses are not co-existent. Even a cellular operator whose system overlaps a PCS licensed market by more than 20% may need to acquire some part of the PCS spectrum to competitively extend its wireless system coverage footprint to be co-existent with its other CMRS competitors.

an available alternative, such a party will have a variety of means of complying with the spectrum cap limits on a timely basis and without negatively impacting the larger transaction. There is no public policy reason to assume that such acquisitions will be based on market-abusive incentives rather than on valid, economic business judgments.

Insofar as the public interest will be served by allowing licensees the opportunity to define their own spectrum requirements and geographic markets and then disaggregate and partition accordingly, there is no reason to deny such an opportunity even to firms with existing CMRS interests whose acquisitions will, temporarily, exceed the spectrum cap. As long as such parties are prepared to divest at an early date the "offending" interests through the various means available, there is little incentive or likelihood for anti-competitive conduct.

Accordingly, the Commission should consider liberalizing, if not eliminating altogether, the divestiture restrictions contained in Rule 20.6(e)(1)(i) through (iii). Given the effectiveness of the spectrum caps, coupled with the fact that interests beyond the cap may be retained for only a short period of time (*i.e.,* 90 days of final grant), it is not clear that the rigid restrictions contained in these subsections are necessary.

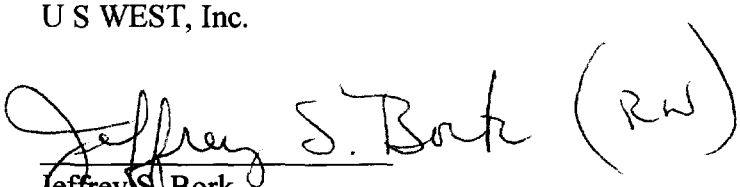
V. Conclusion

For the foregoing reasons, the Commission should permit spectrum disaggregation immediately and permit anyone to acquire a partitioned license, using any boundary

agreed to by the parties. The Commission should also amend its divestiture rule to take account of the changes made to the partitioning and disaggregation rules.

Respectfully submitted,

U S WEST, Inc.



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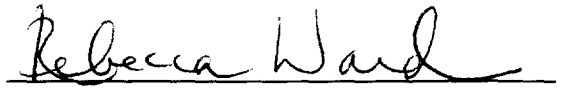
CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 30th day of August, 1996, I have caused a copy of the foregoing **U S WEST REPLY COMMENTS** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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Last Update: 8/30/96